K. Chad Burgess
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April 20, 2018

VIA ELECTRONIC FILING

The Honorable Jocelyn G. Boyd
Chief Clerk/Administrator
Public Service Commission of South Carolina
101 Executive Center Drive
Columbia, South Carolina 29211

Re: Friends of the Earth and Sierra Club v. South Carolina Electric & Gas Company
Docket No. 2017-207-E

Dear Ms. Boyd:

Enclosed for filing on behalf of South Carolina Electric & Gas Company ("SCE&G") is its Response in Opposition to Complainants' Second Motion to Compel Discovery ("Response") in the above-captioned docket.

By copy of this letter, we are serving counsel for the Complainant and the other parties of record with a copy of SCE&G's Response and enclose a certificate of service to that effect.

Very truly yours,

K. Chad Burgess

KCB/kms
Enclosure
cc: Robert Guild, Esquire
Christopher R. Koon, Esquire
Christopher S. McDonald, Esquire
Frank R. Ellerbe III, Esquire
J. Blanding Holman IV, Esquire
James R. Davis, Esquire
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(all via electronic mail and U.S. First Class Mail w/enclosure)

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BEFORE
THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
DOCKET NO. 2017-207-E

In Re: Friends of the Earth and Sierra Club, Complainants/Petitioners,	)
v.	)
South Carolina Electric & Gas Company, Defendant/Respondent.	)

DEFENDANT/RESPONDENT'S RESPONSE IN OPPOSITION TO COMPLAINANTS' SECOND MOTION TO COMPEL DISCOVERY

Defendant/Respondent South Carolina Electric & Gas Company ("SCE&G"), pursuant to Rules 26 and 37 of the South Carolina Rules of Civil Procedure and Chapter 103, Article 8 of the South Carolina Code of Regulations, serves its Response in Opposition to the Second Motion to Compel Discovery (the "Motion") filed by Complainants Friends of the Earth ("FOE") and the Sierra Club (collectively, "Complainants") as follows.

INTRODUCTION

Complainants filed this proceeding on June 22, 2017, seeking an order directing SCE&G to cease construction of Units 2 and 3 of the V.C. Summer Nuclear Power Plant (the "Project") and requesting the Commission to determine the prudency of abandonment of the Project. Complainants received the main part of the relief sought in their petition in light of SCE&G's decision to cease construction of the Project weeks after the petition was filed. Nonetheless, Complainants have continued to pursue relief before the Commission and, in the process, have sought from SCE&G wide ranging discovery on every conceivable facet of the Project with little relevancy to the claims and issues in this proceeding. At the same time, Complainants have refused

to engage with SCE&G on the terms of a confidentiality agreement governing SCE&G's document productions, insisting they be able to publicly disseminate documents they receive in discovery.

Despite Complainants' refusal to agree to shield SCE&G's commercially sensitive information from public disclosure—and in a good faith effort to comply with its discovery obligations—SCE&G began producing documents to Complainants in December 2017, and continued to do so on a rolling basis. To date, SCE&G has produced almost 70,000 pages of documents to Complainants. Approximately 24,000 of those pages were produced by SCE&G after the Hearing Officer's January 25, 2018 Directive on Complainants' first motion to compel, which directed the parties to meet and confer in an attempt to narrow Complainants' overbroad discovery requests. In compliance with the Hearing Officer's Directive, SCE&G met with Complainants to attempt to narrow the discovery requests and maintained its rolling document productions to Complainants despite their continued refusal to agree to a confidentially agreement.

In March 2018, however, confidential documents SCE&G produced to Complainants began to appear in the public domain. In particular, on March 18, 2018, The State published an article stating that its reporters spent the last several weeks reviewing the approximately 70,000 pages SCE&G produced to Complainants in discovery. In light of Complainants' abuse of documents they obtained through the discovery process, SCE&G has responded in good faith to Complainants' most recent round of document requests but has insisted that Complainants agree to a reasonable confidentiality agreement to govern how confidential documents will be used in this proceeding. Soon thereafter, Complainants filed the instant Motion seeking to compel SCE&G to continue producing documents without a confidentiality agreement and raising issues with SCE&G's substantive objections to Complainants' third set of discovery requests.

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The Motion should be denied because (1) Complainants do not enjoy an unfettered right to disseminate documents they receive in pretrial discovery, and (2) SCE&G's objections to Complainants third set of discovery requests are well-founded. First, the purpose of discovery under Rule 26 is to aid a litigant in preparing for trial—not to "promote public scandal" or "titillate the public." Indeed, the right of access to judicial records does not even extend to information collected through the discovery process. Complainants therefore have no right to publicly disseminate every document they receive in pretrial discovery, as they apparently have done to date, and their abuse of this Commission's discovery process for purposes of a publicity stunt justifies SCE&G's refusal to produce documents until Complainants enter into a confidentiality agreement. Second, Complainants' third set of discovery requests are vague, vastly over broad, and unrelated to the issues in this proceeding. SCE&G accordingly requires clarification from Complainants in an effort to better define and narrow Complainants' requests before SCE&G can search for and produce responsive documents.

For these reasons, as stated more fully below, the Motion should be denied.

FACTUAL BACKGROUND

I. DISCOVERY CONDUCTED TO DATE

Complainants served their first set of discovery requests on SCE&G on July 7, 2017, just a few weeks after filing their abandonment petition relating to construction of the Project. They served their second set of discovery requests two months later, on October 10, 2017. Upon denial of SCE&G's motion to dismiss, SCE&G served responses and objections to Complainants' first and second sets of discovery requests on December 1, 2017. SCE&G also began producing documents. In a cover letter sent to counsel for Complainants with SCE&G's first production of documents, SCE&G explained that SCE&G would continue producing documents on a rolling basis in light of the expansive number of documents sought. Complainants served their third

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interrogatories and request for production of documents on SCE&G on March 15, 2018. SCE&G served responses to Complainants' third set of discovery requests on April 4, 2018. To date, SCE&G has produced approximately 70,000 pages of documents to Complainants.

II. COMPLAINANTS' FIRST MOTION TO COMPEL AND THE HEARING OFFICER'S DIRECTIVE

On December 22, 2017, Complainants filed a motion to compel, seeking an order from the Commission directing SCE&G to immediately search for and produce, in essence, every Project-related document. SCE&G opposed the motion on the basis that it was premature, explaining that the Commission should (1) allow the parties time to discuss narrowing the scope of some of the requests, and (2) provide time for SCE&G to complete its production. Specifically, SCE&G explained that its objections to Complainants' requests were fully justified by the breadth, vagueness, and ambiguity of some of the requests, as well as on the grounds that the requests seek privileged information. SCE&G also explained that Complainants' refusal to agree to the terms of a confidentiality agreement prevented SCE&G from voluntarily turning over commercially sensitive documents, particularly given the high-profile nature of the inquiry regarding abandonment of the Project.

The Hearing Officer issued a Directive on January 25, 2018, holding Complainants' motion to compel in abeyance "to allow SCE&G to complete its production and to also allow the parties to discuss narrowing the scope of some of the requests." *See* Hearing Officer Directive (Order No. 2018-13-H) (Jan. 25, 2018) ("Directive"). With respect to the necessity of a confidentiality agreement, the Hearing Officer took "no position." *Id.* The Hearing Officer did, however, direct the parties' attention to the case of *Hamm v. SCE&G et al.*, 312 S.C. 238 (1994), "as a useful reference on the issue." *Id.*

III. SCE&G'S EFFORTS TO COMPLY WITH THE HEARING OFFICER'S DIRECTIVE

After receiving the Directive, SCE&G continued its rolling productions—making a fourth production of documents the next day, on January 26, 2018—and engaged in a good faith effort with Complainants to narrow the scope of their requests. In furtherance of this effort, SCE&G sent a letter to Complainants on February 13, 2018: (1) identifying the requests that are vague, overbroad, or lacking sufficient precision, (2) clarifying the applicability of SCE&G's objections, and (3) suggesting potential approaches to narrowing the scope of particular requests to facilitate additional responses. *See* Feb. 13, 2018 Letter (Ex. A). In the letter, SCE&G raised again the issue of a confidentiality agreement that would restrict publication of SCE&G's confidential and commercially sensitive documents, noting that the authority cited in the Hearing Officer's Directive suggests that SCE&G would be entitled to a protective order shielding dissemination of commercially sensitive documents.

The parties subsequently engaged in a telephonic meet and confer conference on February 23, 2018. At this time, the parties were able to narrow the scope of many of Complainants' requests by identifying the documents Complainants seek and agreeing to narrowly tailored search terms to identify those documents. Complainants continued to refuse at this time, however, to enter into a confidentiality agreement. Based on the clarity SCE&G obtained through the meet and confer process with Complainants, SCE&G made three additional productions of documents to Complainants after receiving the Hearing Officer's Directive, totaling an additional approximate 24,400 pages of documents.

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IV. COMPLAINANTS' DISCOVERY ABUSE AND SECOND MOTION TO COMPEL

SCE&G has insisted that Complainants agree to a reasonable confidentiality agreement after it became apparent that Complainants intended to abuse the discovery process for improper purposes other than to assist Complainants in preparing for trial in this matter.

Specifically, on March 8, 2018, documents with "FOE" bates stamps—*i.e.*, documents SCE&G produced to Complainants in this case—appeared in a Post & Courier Article.[1] The documents include internal SCE&G communications about a commercial warehouse audit of the Project, a copy of the warehouse audit, and Westinghouse/CB&I documents designated as "Proprietary & Confidential" under the Engineering, Procurement and Construction Agreement governing the Project. All of the documents were stamped as "Confidential" by SCE&G before producing the documents to Complainants. Again, on March 16, 2018, an article appeared in The State citing confidential documents Complainants received in discovery in this case.[2] The article expressly states that "reporters at The State" had spent "the past two weeks" reviewing the approximately 70,000 pages SCE&G produced to Complainants. The news article cites to an "internal management report," a "confidential October 2015 report by Westinghouse," and other internal, commercially sensitive documents—many of which are subject to confidentiality agreements between SCE&G and Westinghouse.

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[1] *See* https://www.postandcourier.com/scana-warehouse-audit/pdf_0106f0b0-2313-11e8-b900-c7ebb4ca20f1.html

[2] *See* http://www.thestate.com/news/politics-government/article204840579.html. Tom Clements, a local Friends of the Earth representative, commented on the news article: Good article that gets into the depth of the problems with SCE&G's failed nuclear project. ***If anyone would like a copy of the documents obtained by Friends of the Earth/Sierra Club, get in touch and we can discuss.*** More docs yet to come from earlier requests and we filed another discovery request on March 15. (emphasis added).

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SCE&G served responses and objections to Complainants' third set of discovery requests on April 4, 2018, stating that SCE&G will not produce "non-public, confidential, [or] sensitive" information until the parties execute a mutually agreeable confidentiality agreement. *See* Motion, Ex. 1 (Terms of Response, ¶ 4). SCE&G explained, however, that "upon submitting to a mutually-agreed upon confidentiality agreement, SCE&G will . . . conduct a reasonable, good faith effort to search for, identify, and produce, non-privileged documents [] to the extent that they are relevant to the allegations set forth in Plaintiffs complaint." *See id.* (response to Requests for Production, Nos. 1–11).

Complainants filed their second motion to compel on April 10, 2018. The Motion primarily complains of SCE&G's insistence on a confidentiality agreement as a result of Complainants' indiscriminate dissemination of SCE&G's documents to the press. Mot. at 1, 5. Complainants also take issue with SCE&G's substantive objections to Complainants' third set of discovery requests, contending that SCE&G's "boilerplate" objections on the basis of vagueness and overbreadth are unfounded. Mot. at 2-4.

The Motion should be denied because Complainants' refusal to agree to a confidentiality agreement runs contrary to the Hearing Officer's Directive, the principle that the public's right of access to court documents does not apply to discovery, and South Carolina law protecting proprietary and trade secret information from public dissemination. SCE&G's insistence on a confidentiality agreement is accordingly fully justified. In addition, SCE&G's substantive objections to Complainants' overly broad and vague discovery requests are well-founded. The Commission should accordingly deny the Motion and order the parties to enter a confidentiality agreement and confer in an attempt to narrow Complainants' overbroad and vague discovery requests.

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ARGUMENT

I. COMPLAINANTS' DELIVERY OF DOCUMENTS TO THE PRESS SUPPORTS SCE&G'S INSISTENCE ON A CONFIDENTIALITY AGREEMENT

A. The Hearing Officer's Directive Indicates That Entry Of A Protective Order Restricting Public Dissemination of Documents Is Appropriate In This Case.

The Hearing Officer's Directive on Complainants' first motion to compel, while taking "no position" on SCE&G's request for a confidentiality agreement, suggests that a confidentiality agreement is appropriate in these circumstances. *See* Directive at 2 (citing *Hamm v. SCE&G et al.*, 312 S.C. 238 (1994)). In *Hamm*, the Commission denied a motion to compel documents requested in discovery from SCE&G, granting SCE&G's motion for a protective order as to the requested documents which would "prevent the documents from becoming public." 312 S.C. at 240. The South Carolina Supreme Court affirmed the Commission's holding, explaining that because the South Carolina Rules of Civil Procedure "often allow extensive intrusion into the affairs of both litigants and third parties," the Rules "allow the trial judge broad latitude in limiting the scope of discovery." *Id.* at 241 (citing Rule 26, SCRCP).[3]

Specifically, in that case, the complainant sought discovery of SCE&G's coal purchasing contracts and coal transportation contracts. *Id.* at 240. SCE&G alleged that publication of the contract "would impair its negotiating position in the future with coal vendors and transportation service providers." *Id.* The South Carolina Supreme Court affirmed the Commission's decision to "fashion[] a remedy which protected SCE&G's confidential contracts from public disclosure while at the same time allowed the [complainant] full access to the information he sought." *Id.* at 242 (noting the complainant "was prevented only from disseminating the information").

[3] South Carolina's Rule 26 mirrors the federal rule. *See Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 474 (2009). Courts in South Carolina accordingly look to federal interpretation of Federal Rule of Civil Procedure 26 as "persuasive authority." *State v. Broadnax*, 414 S.C. 468, n.7 (2015).

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The same reasoning applies with equal force here. A narrowly tailored confidentiality agreement would protect Complainants' "rights to secure access to relevant information in discovery," while also protecting SCE&G's interests in shielding commercially sensitive information from publication. *Id.* Yet despite the Hearing Officer's referral to the *Hamm* decision, Complainants have continued to refuse to enter a confidentiality agreement that would restrict public dissemination of SCE&G's commercially sensitive and proprietary information.

B. Complainants' Abuse Of The Discovery Process Justifies Entry Of A Protective Order Governing Any Future Production Of Documents To Complainants.

Complainants' assertion of an "unrestricted right to freely communicate" documents it receives in discovery in this case to "public officials, journalists and interested members of the public" (Mot. at 5) incorrectly assumes that Complainants have an unfettered right to publicly disseminate information they obtain through discovery for purposes unrelated to preparation for trial in this case. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31, 35 (1984) ("It does not necessarily follow [] that a litigant has an unrestrained right to disseminate information that has been obtained through pretrial discovery."); *see also Romero v. Drummond Co., Inc.*, 480 F.3d 1234, 1246 (11th Cir. 2007) (explaining that the "need for public access to discovery is low because discovery 'is essentially a private process .. the sole purpose [of which] is to assist trial preparation'"); *Tillman v. C.R. Bard, Inc.*, 297 F.R.D. 660, 662 (M.D. Fla. 2014) ("To the extent Plaintiff is claiming that she has some right to use documents produced in discovery for purposes outside the litigation, it is not clear that such a right exists.").

Complainants do not enjoy such a right. Indeed, "the right of access" to judicial proceedings "is not absolute" and "does not apply to discovery." *Romero*, 480 F.3d at 1246. This is because "the sole purpose" of discovery "is to assist trial preparation." *Id.*; *see also Singletary*

v. Wells Fargo Wachovia Mortgage Corp., 2012 WL 13000539, at *6 (D.S.C. Oct. 11, 2012) (explaining that "with respect to materials which have been obtained through discovery which are not on the public record, such discovery materials should only be used in a manner consistent with purposes of pretrial preparation in this case"); *Springs v. Ally Fin., Inc.*, 2014 WL 7778947, at *5 (W.D.N.C. Dec. 2, 2014) ("Courts [] must be mindful that the purpose of discovery is to facilitate orderly preparation for trial, not to educate or titillate the public."); *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 355 (11th Cir. 1987) (explaining that the "common-law right of access does not extend to information collected through discovery which is not a matter of public record").

"[T]he prospect of all discovery material being presumptively subject to the right of access would[]"—as it has here—understandably "lead to an increased resistance to discovery requests." *Romero*, 480 F.3d at 1246. Courts have accordingly recognized "an exception to the public right of access" for documents produced in pretrial discovery *(id.)*, because there simply is "no First Amendment right of access to information made available only for purposes of trying [] [a] suit." *Rhinehart*, 467 U.S. at 30–32 (explaining that "petitioners gained the information they wish to disseminate only by virtue of the trial court's discovery processes" and procedural rules which "often allow extensive intrusion into the affairs of both litigants and third parties"); *see also Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 1992 WL 350724, at *1 (N.D. Ill. Nov. 24, 1992) ("A party need not endure public release of that which could not be considered in the decision of its case.").

Moreover—even assuming the public has an interest in disclosure of documents obtained in the discovery process—compelling reasons sufficient to outweigh the public's interest in disclosure and justifying a protective order exist where, as here, Complainants have used the discovery process as a vehicle for improper purposes, such as "use of records to gratify private

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spite, promote public scandal, circulate libelous statements or release trade secrets." *See, e.g., Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006); *Rhinehart*, 467 U.S. at 37 (sufficient cause existed for protective order on the grounds that "dissemination of th[e] information would result in annoyance, embarrassment and even oppression"); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978) ("Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purpose.").

The South Carolina Supreme Court recognized this principle in *Hamm*, relying on the Supreme Court's decision in *Rhinehart* and explaining that "[w]hen the discovery process threatens to become abusive or to create a particularized harm to a litigant," the court has "broad latitude" in limiting the scope of discovery. *Hamm*, 312 S.C. at 241. Complainants' abuse of the discovery process by wholesale delivery of SCE&G's document productions to the press—which has absolutely no relation to the proper use of discovery, *i.e.*, to prepare for trial—constitutes the type of improper purpose that justifies entry of a protective order. *Id.*

C. South Carolina Law Affords Protection to the Type of Commercially Sensitive Information Complainants Seek Here.

Finally, as SCE&G demonstrated in its opposition to Complainants' first motion to compel, SCE&G's request for a confidentiality agreement is fully supported by the protections afforded by South Carolina law to trade secret and commercial information. The South Carolina Rules of Civil Procedure "provide for the protection of trade secret" and commercial information. *See* 26(c), SCRCP (a party may seek protection "from annoyance, embarrassment, oppression, or undue burden" by an order "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way"); *see also Wade v. Chase Bank USA, NA.*, 2013 WL 12154986, at *2 (D.S.C. Nov. 7, 2013) (explaining that the "particulars

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of [the parties'] contractual relationship . . . are confidential" and that "harm will occur" if "competitors gain access" to the information). As does South Carolina's Trade Secrets Act, which is specifically designed to protect trade secrets from discovery in civil actions. *See* S.C. Code Ann. § 39-8-10, *et seq.*

Complainants' discovery requests—which seek virtually every document related to the Project—plainly encompass commercially sensitive information falling within the protections afforded by South Carolina law. Specifically, Complainants' seek, among other things, SCE&G's internal commercial and financial analyses of the viability of the Project, contracts and agreements with Westinghouse, internal analyses regarding abandonment of the project as well as other internal investigations and reports performed on the Project, and other proprietary and commercially sensitive information. SCE&G maintains a strict practice of confidentiality with respect to the types of commercially sensitive documents Complainants seek. And, with the protections afforded trade secret information by South Carolina law and the clear competitive harm that would result from publication of proprietary SCE&G documents, SCE&G simply cannot agree to voluntarily turn over many of the documents Complainants request without restriction.

The commercially sensitive and proprietary nature of the documents Complainants request serves as additional support for entry of a protective order in this case which would restrict public dissemination of SCE&G's documents.

II. SCE&G'S OBJECTIONS TO COMPLAINANTS' THIRD SET OF DISCOVERY REQUESTS ARE FULLY JUSTIFIED BY COMPLAINANTS' OVERLY BROAD AND VAGUE REQUESTS

SCE&G's remaining objections to Complainants' third set of discovery requests are fully justified by Complainants' vague and vastly overbroad requests. In particular—much like with Complainants' first and second set of discovery requests—the third set of requests are vaguely

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defined and span an overly broad range of topics that appear to be designed to require SCE&G to produce every document related to the Project. While Complainants contend that seven (7) of the twelve (12) document production requests "expressly reference documents previously produced" by SCE&G (Mot. at 3–4), Complainants have not simply requested the referenced documents (*i.e.*, "Project Review Meeting Minutes"). Complainants broadly request all "similarly entitled" documents "since the nuclear project's inception," as well as all related documents.

For example, Request for Production No. 1 seeks all documents "relating to" monthly "Project Review Meeting Minutes" including "similarly entitled meetings," and specifically includes all materials "referred to or reviewed" at the meetings, materials used in preparing for the meetings, and "all documents reflecting actions taken and resolution of issues identified in such meetings." While referencing a specifically identified "Project Review Meeting," the request is vague and vastly overbroad because it encompasses every conceivable document related to any other similar meeting "since the nuclear project's inception." Each of the requests for "expressly reference[d] documents" in SCE&G's previous document productions suffers the same flaws. *See, e.g.*, Request No. 2 (seeking "all documents relating to High Bridge Reviews" as well as "all work papers and materials used in preparing for" the reviews and "documents reflecting actions taken and resolution of issues identified in such reviews"); Request No. 4 (seeking "all documents relating" to a Risk Management Risk Mitigation Plan as well as documents "relating to" certain items listed in the document and "all documents reflecting actions taken and resolution of issues in such plans"). SCE&G requires clarification and narrowing of these requests (in addition to a confidentiality agreement) before it can agree to search for and produce responsive documents.

SCE&G's objections to the remaining five requests are equally justified. For example, Complainants seeks all documents and communications among five individuals that "concern[]

financial issues regarding the nuclear project." *See* Request No. 7. The broad request for every conceivable financial document is not defined with sufficient precision to enable SCE&G to decipher the documents Complainants request. Nor is Complainants' request for "documents relating to abandoned nuclear project cost recovery proposals." *See* Request No. 10. In addition, SCE&G has objected to producing documents in response to requests that simply have no relevance at all to the issues in this action. In particular, Complainants continue to seek "[a]ll documents provided in discovery or data requests to any other party" without justifying the relevancy of the documents to the issues in this action. Complainants also seek documents related to the employment of SCE&G's outside construction litigation counsel, which has no apparent relevance to the issues in this action. *See* Request No. 11.

In sum, because SCE&G's objections to Complainants' third set of discovery requests on the basis of overbreadth, vagueness, and relevancy to the issues in this case are fully justified, the Motion should be denied for this additional reason.[4]

CONCLUSION

WHEREFORE, for the foregoing reasons, SCE&G respectfully requests that the Commission deny Complainants' Second Motion to Compel Discovery in its entirety.

[SIGNATURE PAGE FOLLOWS]

[4] At the very least, Complainants' Motion is premature as Complainants have made no attempt to confer with SCE&G on its objections in an attempt to narrow the parties' dispute.

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Respectfully submitted,

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April 20, 2018
Cayce, South Carolina

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BEFORE
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DOCKET NO. 2017-207-E

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v.	)
South Carolina Electric & Gas Co., Defendant/Respondent.	)

CERTIFICATE OF SERVICE

This is to certify that I have caused to be served this day, April 20, 2018, one copy of Defendant/Respondent's Response in Opposition to Complainants' Second Motion to Compel Discovery to the persons named below at the addresses set forth via U.S. First Class Mail and electronic mail:

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